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In the Supreme Court of the United States

OCTOBER TERM, 1978

JULIO MUNIZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends (Pet. 8-18) that the 43-month delay between the time of his offense and the time of his indictment deprived him of due process of law.

1. Following a jury trial in the United States District Court for the District of Connecticut, petitioner was convicted of selling heroin, in violation of 21 U.S.C. 841(a)(1). He was sentenced to six years' imprisonment, to be followed by a special parole term of three years, and he was fined $10,000. The court of appeals affirmed (App. A, *infra*, 1a-3a).

The evidence showed that in February 1974 agents from various federal agencies, the Connecticut State Police, and local police departments formed a task force in order to investigate illegal narcotics activities in Connecticut. On February 11, 1974, two informants, Victor Cuevas and Gladys Hernandez, introduced Agent Moniz, a task force member, to a drug-dealer known as "Julio." That evening, accompanied by two informants, Agent Moniz purchased $250 worth of heroin from "Julio." The actual transfer of the drug took place outside the presence of the informants. The following day, Agent Moniz identified a photograph of petitioner as the "Julio" from whom he had purchased the heroin. Agent Moniz and petitioner met again on February 14, 1974, to discuss further sales of heroin, but no additional sales were made (App. A, *infra*, 2a; App. B, *infra*, 4a-5a; Tr. 24-33; H. Tr. 66-68, 78-79).[1]

Thereafter the Connecticut state officials agreed with DEA to assume responsibility for the investigation and prosecution of petitioner's case. In January 1975 the state commenced prosecution and obtained a warrant for petitioner's arrest. However, for over two years state authorities were unable to locate petitioner. Because of the state's inability to arrest petitioner and because other unrelated federal investigations had focused on petitioner, the United States Attorney for the District of Connecticut de-

[1] "H. Tr." refers to the transcript of the September 25, 1978 hearing on petitioner's motion to dismiss the indictment because of preindictment delay.

cided in August 1977 to seek a federal indictment against petitioner. Accordingly, the state withdrew its warrant on August 25, 1977, and on September 8, 1977, a federal grand jury indicted petitioner. Subsequently, federal agents located petitioner in Chicago, Illinois, and local police arrested him on April 17, 1978 (App. B, *infra*, 5a-7a; H. Tr. 41-44).[2]

2. Petitioner argues (Pet. 8-18) that the 43-month delay between the sale of heroin and his federal indictment violated his right to due process of law. However, preindictment delay does not deprive a defendant of his constitutional rights unless he can demonstrate that the delay caused actual prejudice to his defense and that the delay was improperly motivated by desire to gain a tactical advantage over the accused. *United States* v. *Lovasco*, 431 U.S. 783, 790, 795 (1977); *United States* v. *Marion*, 404 U.S. 307, 324 (1971). And here, as both courts below concluded, the delay neither prejudiced petitioner nor resulted from improper government behavior (App. A, *infra*, 2a-3a; App. B, *infra*, 8a).

"[P]roof of prejudice is generally a necessary but not [by itself] sufficient element of a due process claim * * *." *United States* v. *Lovasco*, *supra*, 431 U.S. at 790. Petitioner acknowledges (Pet. 11) that a 43-month preindictment delay does not of itself demonstrate prejudice cognizable under the Due Process

[2] An earlier search of petitioner's apartment pursuant to a warrant revealed six pounds of heroin. The state court suppressed this evidence because the warrant had issued without probable cause (Sentencing Tr. 8-9).

Clause. See, *e.g.*, *id.* at 796; *United States* v. *Marion*, *supra*, 404 U.S. at 324-325 (38-month delay); *United States* v. *Medina-Arellano*, 569 F.2d 349, 352-353 (5th Cir. 1978) (4-year delay); *United States* v. *Lane*, 561 F.2d 1075, 1077 (2d Cir. 1977) (several years' delay); *United States* v. *Pollack*, 534 F.2d 964, 969-970 (D.C. Cir.), cert. denied, 429 U.S. 924 (1976) (more than 3 years' delay). He nonetheless claims that the government's inability to locate two informants at the time of trial constituted actual prejudice.[3] But contemporaneous to petitioner's offense both informants made sworn statements inculpating him (App. B, *infra*, 5a, 8a). In these circumstances, the lower courts correctly found that petitioner had not suffered any prejudice and that there was therefore no basis for his constitutional claim (App. A, *infra*, 2a; App. B, *infra*, 8a). *E.g.*, *United States* v. *Lovasco*, *supra*.[4]

Moreover, "[n]o improper Government motive caused any delay which may have occurred" (App. B, *infra*, 8a; App. A, *infra*, 2a-3a). Rather, the delay was the result of the government's reasonable decision to allow the state authorities to investigate and prosecute petitioner[5] and of petitioner's subsequent flight

[3] The trial court expressly found that the government agents "used all due diligence in attempting to locate the informants * * *" (App. B, *infra*, 8a).

[4] Petitioner's reliance (Pet. 9) on the Confrontation Clause of the Sixth Amendment is frivolous, since the informants were not witnesses against him.

[5] See Schwartz, *Federal Criminal Jurisdiction and Prosecutor's Discretion*, 13 Law & Contemp. Prob. 64 (1948).

from Connecticut for over two years. The latter cause of delay is, of course, not attributable to the government, and the former is not fairly described as "delay undertaken by the Government solely 'to gain tactical advantage over the accused.'" *United States* v. *Lovasco*, *supra*, 431 U.S. at 795, quoting *United States* v. *Marion*, *supra*. In short, the 43-month delay did not deprive petitioner of due process of law. See also *United States* v. *Lai Ming Tanu*, 589 F.2d 82 (2d Cir. 1978); *United States* v. *Mejias*, 552 F.2d 435 (2d Cir.), cert. denied, 434 U.S. 847 (1977).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

MAY 1979

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket No. 78-1423

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

JULIO MUNIZ, DEFENDANT-APPELLANT.

Before: HON. IRVING R. KAUFMAN, Chief Judge, MURRAY I. GURFEIN, (WILLIAM H. MULLIGAN, Recused), Circuit Judges.

New York, March 12, 1979

STATEMENT MADE BY THE COURT AT DISPOSITION OF APPEAL IN OPEN COURT.

JUDGE KAUFMAN: We will affirm in *United States* v. *Muniz*. I would like to state first that Judge Mulligan had disqualified himself and so the decision will be both Judge Gurfein and me, pursuant to the Second Circuit Rule—I refer to Rule 0.14(b)—which permits a decision of this kind, where we're in agreement and the third member finds himself disqualified.

In appealing his conviction for selling the heroin, Julio Muniz has challenged the sufficiency of the identification testimony in trial, and he has asserted that his due process rights were violated by a 43-month delay between the sale and his indictment by

a federal grand jury. We find neither contention convincing.

Viewing the identification evidence in the light most favorable to the Government, I refer you to *United States* v. *Mariani*, 539 F.2d, it is clear that the jury could have been convinced beyond a reasonable doubt that appellant was the person who sold Agent Moniz (as distinguished from spelling of Muniz) the heroin. Even if showing Moniz a single photograph of appellant did taint the initial identification, the taint was completely erased when Moniz met Julio for a second time and was thereby able to reconfirm his identification.

The speedy trial clause of the Sixth Amendment does not cover delay before an indictment, although due process violation may require a dismissal of the indictment. Under the strict test of *United States* v. *Lovasco*, in 431 U.S., we have little difficulty in holding that the delay in returning the federal indictment did not deny appellant due process of law. As Judge Gurfein recently noted, in *United States* v. *Lai Ming Tanu*, decided November 17, 1978, Lovasco requires the defendant to prove not only actual and prejudicial delay, but also improper notice on the part of the Government, in causing the delay. Here appellant did not suffer prejudice because of the absence of Suevez [sic] and Hernandez because, as Judge Clarie found, their testimony, were it to have been available, would more likely have aided the Government than the appellant, and although the lack of prejudice is sufficient basis for us to affirm, we note in addition that

Judge Clarie's finding that the federal prosecutors had not acted improperly was solidly supported by the record. *Lovasco* emphasizes that a decision to defer prosecution to await better evidence, or to avoid prejudicing an ongoing investigation, is well within a prosecutor's discretion, and in *Lai Ming Tanu*, we explicitly held that a United States Attorney had a right to defer to a state prosecution without occasioning a due process violation. Accordingly, we affirm.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Criminal No. N 77-104

UNITED STATES OF AMERICA

— *vs* —

JULIO MUNIZ

FINDINGS OF FACT
RE: MOTION TO DISMISS

1. From February, 1974 through January, 1975, agents of the federal Drug Enforcement Administration ("DEA") and the Connecticut Statewide Narcotics Task Force conducted an investigation in the Willimantic, Connecticut area.

2. In the course of that investigation, two informants named Victor Cuevas and Gladys Hernandez ("the informants") offered to introduce DEA undercover agents to heroin dealers in the Willimantic area.

3. On February 11, 1974, the informants introduced Henry Moniz, a Special Agent of the Bureau of Alcohol, Tobacco and Firearms assigned temporarily to DEA, to a person whom Agent Moniz subsequently identified as Julio Muniz. The sale of heroin is alleged in the indictment to have occurred on that date. Although the informants aided in the preliminary negotiations leading to the sale, this sale

of heroin took place out of the presence of the informants.

4. On February 13, 1974, the informants subscribed and swore to the statement which has been admitted into evidence as an exhibit. This statement fully corroborates the Government's theory of the case and Agent Moniz' testimony.

5. On February 14, 1974, Henry Moniz again met with the person whom he identified as Julio Muniz, during which meeting a further sale of heroin was discussed. No sale of heroin took place at that meeting.

6. On February 19, 1974, the informants told officers of the DEA that defendant was planning to flee to Puerto Rico because he had become aware of the identity of Agent Moniz.

7. At that time, Special Agent John Sherry, a DEA officer, decided that no arrest should be made, because the laboratory report describing the contents of the February 11, 1974 purchase had not been received and because an arrest at that time would have confirmed that the informants were acting in behalf of law enforcement officers, thus jeopardizing the federal-state Willimantic investigation.

8. On March 5, 1974 a report was received from the DEA Regional Laboratory, stating that the substance purchased on February 11, 1974, was, in fact, heroin.

9. During the month of March, 1974, agents of the DEA decided to allow the state authorities to proceed with the prosecution of the defendant. Agent

Moniz subscribed and swore to an affidavit describing the events of February 11, 1974, which was turned over to state authorities for use in their prosecution.

10. The federal-state investigation in Willimantic continued until January, 1975. Upon its conclusion, several arrests were made and prosecutions commenced.

11. Among these prosecutions was the prosecution of the defendant. On January 29, 1975, the State's Attorney's Office for Windham County made application for an arrest warrant for the defendant, charging him with a sale of heroin on February 11, 1974, in violation of Connecticut General Statutes §§ 19-480(a) and 19-481(a). Judge Barber signed that arrest warrant.

12. From January 29, 1975 until August 25, 1977, Connecticut authorities were unable to locate and apprehend the defendant. During that period, defendant was twice arrested in Chicago. In addition, defendant's name surfaced in various unrelated federal investigations in Puerto Rico and Chicago. Agent John Sherry has testified that the reason that Connecticut authorities were not contacted concerning the location of the defendant was that information concerning the Connecticut arrest warrant had not been supplied to the National Crime Information Center computer.

13. As a result of this failure to apprehend the defendant and as a result of information concerning the defendant's activities arising in the course of an unrelated investigation, the United States Attorney's

Office decided to seek an indictment against the defendant.

14. As a result of a request by the United States Attorney's Office, the Windham County bench warrant was withdrawn by Superior Court Judge Cramer on August 25, 1977.

15. On September 8, 1977, a federal grand jury returned the indictment in the present case.

16. On September 19, 1977, DEA agents caused defendant to be placed on all want/alert systems.

17. In early 1978, Internal Revenue Service Special Agent George Stern located the defendant in Chicago, and advised DEA Agent John J. Mann that the defendant had been located.

18. On April 17, 1978, the defendant was arrested.

19. On May 1, 1978, a removal hearing was held in the Northern District of Illinois, resulting in the issuance of a warrant of removal.

20. On May 10, 1978, defendant was arraigned before Judge Daly in Bridgeport. Upon the motion of defendant's local counsel, Thomas Fahey, the case was transferred to Hartford.

21. On July 5, 1978, this case was set for trial before the Court, with jury selection schedule to take place on July 6. This Court granted defendant's motion for a continuance, setting down jury selection and trial for early September.

22. After continuing to serve as informants for state and local law enforcement officials, the informants left Connecticut approximately two years ago and have not since that time been in contact with

either DEA agents or the local officers with whom they developed a close relationship. Although DEA agents and local police officers have used all due diligence in attempting to locate the informants in order to obtain their testimony against the defendant, they have been unable to locate them.

23. Criminal prosecution for the event alleged in the present indictment had commenced on January 29, 1975. Any delay in prosecuting the case after January 29, 1975 had been caused solely by the inability of law enforcement officials to apprehend the defendant.

24. No actual prejudice to the conduct of the defense in this case resulted from any delay in trying the defendant. The statement sworn to by the informants at the time of the offense indicates that their testimony would strengthen the Government's case, if the informants could be located to testify.

25. No improper Government motive caused any delay which may have occurred. There has been no showing that the Government intentionally delayed prosecuting this case in order to gain some tactical advantage over the defendant or to harass him.

Dated at Hartford, Connecticut, this 30th day of October, 1978.

/s/ T. Emmet Clarie
T. EMMET CLARIE, Chief Judge

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